UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 04 2001

REPLY TO THE ATTENTION OF:

R-19J

Karen A. Studders,
Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-4194

Re: State Program Approval for the Underground Storage Tank Program

Dear Ms. Studders: Karen

This letter is in response to your letter, dated November 21, 2000, concerning the Minnesota Pollution Control Agency's (MPCA) application for State Program Approval for the Underground Storage Tank Program pursuant to Section 9004 of the Resource Conservation and Recovery Act. The United States Environmental Protection Agency, Region 5, (U.S. EPA) is in the process of reviewing the MPCA application for completeness under the Federal State Program Approval regulations. Once that review is complete and once it has been determined that the application is complete, the U.S. EPA will publish a notice of tentative determination concerning that application.

More particularly, your letter addresses the issue of the boundary of the Mille Lacs Reservation. Your letter sets forth the State of Minnesota's position concerning that boundary and requests that your letter become a part of the application package for the Underground Storage Tank Program. While we appreciate the State's position, we feel it necessary to reaffirm our previous position concerning the extent of the Mille Lacs Reservation that we have taken in the context of the operation of other Federal environmental programs, namely that the Mille Lacs Reservation encompasses approximately 61,000 acres. As you, no doubt, are aware, the U.S. Department of Interior is the Department responsible for determining the boundaries of Reservations such as the Mille Lacs Reservation. Previously, the Department has provided the EPA with an opinion as to the extent of that Reservation and the U.S. EPA has relied on, and continues to rely on, this opinion for the purpose of determining the

extent of Indian Country within a State. This opinion was set forth in a letter dated February 28, 1991. A copy of this letter is attached for your information.

We agree that this issue is not well suited for resolution in the context of an administrative determination concerning State Program Approval. We also appreciate the MPCA's willingness to cooperate with the U.S. EPA despite our difference of position with regard to the boundary issue. Finally, we understand that the State reserves its right to challenge the extent of the Reservation in an appropriate forum. That being said, we must reiterate that it is the U.S. EPA's position that the boundaries of the Mille Lacs Reservation are those the Department has previously determined to exist. The U.S. EPA's approval of the MPCA Underground Storage Tank Program, should that occur, will not extend to Indian Country as indicated in the Memorandum of Agreement you quote in your letter. Since the term "Indian Country" includes all land within the exterior boundaries of a Federal Indian Reservation, any approved State Program will not extend within the boundaries of the Mille Lac Reservation as determined by the Department. For your information, this issue is likely to be addressed in the Federal Register Notice of Tentative Determination.

Your letter, and this letter, will be included in the administrative record related to our review of the MPCA State Program Application. Please feel free to contact Willie Harris, of my staff, should you have any questions concerning this matter.

Sincerely,

Francis X. Lyons
Regional Administrator

cc: Willie Harris, U.S. EPA, Region 5
Andrew Tschampa, U.S. EPA, Region 5
Delores Sieja, U.S. EPA, Region 5
Thomas Kenney, U.S. EPA, Region 5
Jerry Parker, U.S. EPA, Headquarters - OUST
Carmen Chittick Dierking, Assistant Attorney General

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United States Department of the Interior

IN REPLY REFER TO:

FILE COPY

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

February 28, 1991

BIA.TC.3397

Mr. Earl J. Barlow
Minneapolis Area Director
Bureau of Indian Affairs
15 South 5th Street
Minneapolis, Minnesota 55402

Re: Mille Lacs Reservation Boundaries

Dear Mr. Barlow:

This is in response to your request that we provide an opinion on the issue of the boundary of the Mille Lacs Indian Reservation. From time to time, various entities have speculated that the boundaries established by the Treaty of February 22, 1855, 10 Stat. 1165, have been disestablished such that the reservation has been diminished and presently consists only of lands held in trust for the Mille Lacs Band (or the Minnesota Chippewa Tribe). For the reasons set for the below, it is our opinion that the boundaries established by the 1855 treaty remain intact and that the reservation has not been diminished.

The current analytic structure for determining whether a statute had the effect of terminating or diminishing a reservation is summarized in the Supreme Court's decision in Solem v. Bartlett, 465 U.S. 463 (1984). In that case, the court set out guidelines to aid in the interpretation of statutes affecting the status of reservations. Those "pronouncements" in Solem are summarized in Pittsburg and Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) as follows:

> First, it is well established that Congress has the power to diminish a reservation unilaterally. [Citations omitted.] Nonetheless, diminishment will not be lightly inferred [Citation omitted]. Congress must clearly evince the intent to reduce boundaries, [citations omitted], and traditional solicitude for Indian rights favors the survival of reservation boundaries in the face of the opening up of reservation lands to settlement and entry by non-Indians. [Citations omitted]. Courts may not, however, "ignore plain language that, viewed in historical context and

given a 'fair appraisal' clearly runs counter to a tribe's later claims." [Citations omitted]. 909 F.2d 1387 at 1393.

The foregoing approach to analyzing the impact of Congressional action on reservation boundaries involves the application of judicial presumptions and standards that have developed in the absence of clear Congressional intent in the so-called "surplus land" statutes. That is, Congress opened reservations to non-Indian settlement and set up schemes for the passage of title, but failed to recognize a distinction between title and boundary interests. That failure is a result of the reality that contrary to expectations in the late 1800's, the reservations and the tribes did not disappear into the amalgam of American society. When they did not disappear, disputes arose over reservation boundaries and in resolving those conflicts, the Supreme Court has applied a presumption that ambiguous congressional action affecting Indian rights is to be resolved "to the benefit of the Indians". See, Decoteau v. District County Court, 420 U.S. 425 (1975).

Because the distinction between title and boundaries has become increasingly important in the wake of the development of principles of Indian tribal sovereignty, the Supreme Court has required that an alleged diminishment statute must clearly reflect specific Congressional intent to diminish both boundaries and Indian title. The specific intent requirement in analyzing alleged diminishment statutes gives affect to a judicial presumption that Congress intended to deal fairly with the Indians, and it is in the light of that "fair deal" presumption that each boundary issue must be judged.

The history of the Mille Lacs Reservation following its creation in 1855 encompasses a complex, convoluted succession of treaties, agreements, Executive branch rulings, and Congressional enactments. Although the official acts of the government evince a great effort to remove the Mille Lacs Band from the reservation and an effort (albeit not without vacillation) to legitimize the presence of white settlers, there is no clear Congressional intent to reduce the boundaries of the Mille Lacs Reservation.

A summary of Congressional action begins with the Treaty of 1864. By that treaty, the Band ceded the 1855 Reservation to the United States, but expressly retained the right to remain on the reservation so long as its members did not interfere with or molest the whites. There is no doubt that the Band did not violate that "good conduct" provision, but in the two decades that followed the federal government - despite efforts to stem the flow of trespassers onto the reservation and to protect the interests of the Indians in the lands - eventually allowed claims on or issued patents to 5/6 of the reservation's approximately 61,000 acres. It is important to note, however, that the claims

and patents were not the result of a Congressional enactment throwing the reservation open to settlement under the public land laws. Instead, the entries were made on the basis of directives and orders of the Department of the Interior under intense pressure from timber and land interests.

Following the incursion into the reservation and the debate over its propriety within the Executive Branch, Congress enacted the Act of July 4, 1884, 23 Stat. 89. That statute recognized the controversy surrounding the settlement of the Mille Lacs Reservation and prohibited additional disposition of lands within the Reservation until further action by Congress. That further action come in the form of the Act of January 14, 1889, 25 Stat. 642, also known as the Nelson Act. By that statute, Congress created the framework for the cession of all Chippewa reservations in Minnesota except portions of the White Earth and Red Lake Reservations. A commission was appointed to negotiate with the Chippewa for the removal of the Grand Portage, Fond du Lac, Mille Lacs, Bois Forte and Leech Lake Bands to the White Earth Reservations, but Section 3 of the Nelson Act allowed any member of those five Bands to remain on their home reservations and take an allotment of land there rather than remove to White Earth.

Under the auspices of the Nelson Act, an agreement with the Mille Lacs Band was negotiated and approved. Although the agreement with the Mille Lacs Band contained cession language with respect to the 1855 reservation and the right of occupancy reserved in the 1864 treaty, it is clear that the Band members intended to exercise their right to remain on their ancestral homeland and to take allotments there rather than relocate to White Earth.

Subsequent to the Nelson Act and the agreement made pursuant to it, the Mille Lacs Indians endeavored to secure the promised allotments but were frustrated by actions of the Executive Branch with respect to renewed entries and settlement on the reservation. By the turn of the century, the government had allowed so many non-Indians to enter and settle upon the reservation, and did so little to preserve the right of allotment reserved to the Mille Lacs members, that few lands suitable for allotment remained in government hands. Notwithstanding the fact that title to the land passed to others, there is no clear evidence that Congress considered the reservation boundaries either diminished or terminated. To the contrary, in both the Act of July 22, 1890, 26 Stat. 290, and the Act of May 27, 1902, 32 Stat. 268, Congress referred to the rights of Indians "within [the] Mille Lacs Reservation." The latter statute provides evidence that Congress believed the reservation continued to exist in that the act offered the Indians inducements - as well as exceptions - to removal from the Mille Lacs Reservation. If the reservation had ceased to exist by virtue of the Nelson Act agreement (which had been approved years earlier), there is

nothing in the 1902 act which evinces a Congressional understanding that that was so.

The Mille Lacs Band persisted in its insistence that the Band's understanding of the right to remain and take allotments under the Nelson Act. As with the other Chippewa Bands, some moved to White Earth and took allotments. However, the great majority remained and by the Act of August 1, 1914, 38 Stat. 582, Congress specifically appropriated $40,000 for the purpose of acquiring lands to be allotted to the Mille Lacs Indians remaining on the reservation. The acquisition of lands by purchase was necessary because in the preceding decades the government had allowed others to acquire reservation lands and had not honored the legitimate expectation of allotment under Section 3 of the Nelson Act.

Given that history and keeping in mind the judicial standards applicable to the issue of boundary disestablishment, the question of the impact of other Minnesota boundary cases must be addressed. The situation most analogous to that of Mille Lacs is discussed in Leech Lake Band of Chippewa Indians v. Herbst, 334 F.Supp. 1001 (D.Minn. 1979). In that case, the court held that the Nelson Act did not terminate or diminish the Leech Lake Reservation - one of the five reservations which like Mille Lacs were "ceded" pursuant to Nelson Act agreements. The Leech Lake boundary was again at issue in State v. Forge, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978), and State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980), dealt with the White Earth boundary. Both decisions concluded that the reservation boundaries had not been disestablished.

At about the same time, in United States v. Minnesota, 446 F.Supp. 1382 (D.Minn. 1979), aff'd sub nom. Red Lake Band v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), the federal court held that the Nelson Act had terminated a portion of the Red Lake Reservation. Similarly, in White Earth Band v. Alexander, 518 F.Supp. 527 (D.Minn. 1981), aff'd, 683 F.2d 1130 (8th Cir. 1982), the federal court found that four townships of the White Earth Reservation were removed from the reservation. Those decisions, however, do not compel a conclusion that the Mille Lacs boundaries were disestablished. In both the case of Red Lake and the "four townships", there is clear evidence of the areas at issue were to be dealt with differently than the ceded reservations (Mille Lacs, Leech Lake, and the others) where the Indians could remain and take allotments. The "diminished" area of the Red Lake Reservation consisted of a vast area of sparsely inhabited lands. Even after diminishment, the remaining Red Lake Reservation encompassed hundreds of thousands of acres, including the historic population centers of that Band. With respect to the four townships in the northeastern portion of the White Earth Reservation, the record is clear that those specific lands were

to be treated differently than the balance of the reservation. (In fact, it is clear that the Secretary of the Interior treated the Red Lake ceded lands and the four townships as exceptions to the general rule, and the judicial decisions have confirmed that different treatment. See, H.R. Ex. Doc. No. 247 at 10.)

In short, the circumstances of the Mille Lacs Reservation do not parallel either the Red Lake ceded area or the four townships ceded at White Earth. There is no clear evidence that Congress intended to reduce the boundaries. Given the judicial standards governing analysis of boundary issues, we are of the opinion that the Mille Lacs Reservation boundaries encompass the territory described in the Treaty of 1855.

Sincerely yours,

Mark A. Anderson
For the Field Solicitor

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